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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1943

No. 84

DIXIE PINE PRODUCTS COMPANY, PETITIONER,

vs.

COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED JUNE 5, 1943.

CERTIORARI GRANTED OCTOBER 11, 1943.

SUPREME COURT OF THE UNITED STATES

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[fol. "A"] [Caption omitted]

[fol. 1]

BEFORE UNITED STATES BOARD OF TAX APPEALS

Docket No. 103015

DIXIE PINE PRODUCTS COMPANY, Petitioner,

versus

COMMISSIONER OF INTERNAL REVENUE, Respondent

APPEARANCES:

For Taxpayer:

R. J. Wooton, Esq., T. J. Wills, Esq., Harry B. Kelleher, Esq.

For Comm'r:

Donald P. Moyers, Esq.

1940

May 28—Petition received and filed. Taxpayer notified. (Fee paid.)

May 28—Copy of petition served on General Counsel.

June 15—Amended petition filed. 6/17/40 copy served on General Counsel.

Aug. 2—Answer to amended petition filed by General Counsel.

Aug. 2—Request for hearing in New Orleans, La., filed by General Counsel.

Aug. 7—Notice issued placing proceeding in New Orleans, La., Calendar. Answer and request served.

Dec. 11—Hearing set Jan. 27, 1941, New Orleans, La.

[fol. 2]

1941

Jan. 29—Hearing had before Mr. Murdock on merits. Submitted. Appearance of Harry B. Kelleher and T. J. Wills filed. Briefs due as per rules.

Feb. 7—Transcript of hearing 1/29/41 filed.

Mar. 15—Brief filed by taxpayer. 3/17/41 copy served on General Counsel.

Mar. 15—Brief filed by General Counsel.
Mar. 15—Brief filed by taxpayer. 3/17/41 copy served on General Counsel.
Oct. 7—Findings of fact and opinion rendered, Murdock, Div. 3. Decision will be entered for the respondent. 10/7/41 copy served.
Oct. 11—Decision entered, Murdock, Div. 3.

1942

Jan. 9—Supersedeas bond in the amount of $10,000 approved and ordered filed.
Jan. 9—Petition for review by United States Circuit Court of Appeals, Fifth Circuit, with assignments of error filed by taxpayer.
Jan. 9—Praecipe filed by taxpayer.
Jan. 9—Affidavit of service by mail of petition for review and praecipe, filed by taxpayer.

BEFORE UNITED STATES BOARD OF TAX APPEALS

[Title omitted]

PETITION—Received May 28, 1940

Filed May 28, 1940

Comes the Dixie Pine Products Company, a corporation, located and whose present address is Hattiesburg, Mis-[fol. 3] sissippi, by its attorney, and respectfully shows unto the Court that it is incorporated under the laws of the State of Mississippi, with its principal office and its domicile in the city of Hattiesburg and State of Mississippi, and respectfully appeals from the decision of the Commissioner of Internal Revenue, Agent in Charge of the New Orleans Division, located at New Orleans, Louisiana, rendered on the 15th day of April, 1940, imposing a deficiency in tax for the year ended December 31, 1937, for the sum of $4770.04.

The said record touching the facts upon which the deficiency tax assessment is made and upon which objections have been filed and heard is on file with the Internal Revenue Agent in charge at New Orleans, Louisiana, and the same is prayed to be made a part of this petition upon the filing of the same by the Internal Revenue Agent in

Charge, as if copied herein and in accordance with the provisions of the law and the rules and regulations of this board.

This tax payer would respectfully show unto the Board that it operates upon an accrual basis, that is to say that all of its fixed charges to profit and loss are accrued monthly, 1/12 of the total amount imposed as a charge upon the tax payer, to be paid from its profit and loss account. That during the year 1937 the State of Mississippi imposed a tax upon the solvent used by this tax payer in the operation of its business of extracting rosin from pine wood in its plant located at Hattiesburg, Mississippi. That this tax payer contested the tax so imposed but since the tax assessment was made by the proper official of the State of Mississippi, with the power under the statutes of said State, to collect the same by distress without other or further legal proceedings, this tax payer accrued the tax so assessed against it by the State of Mississippi.

[fol. 4] That this tax payer litigated with the State of Mississippi, the legality of the assessment of the tax so made and in December of 1938 was successful in having the Supreme Court of the State of Mississippi hold that the said tax was not a proper charge against this tax payer.

This tax payer would show that the said solvent tax, herein referred to, was a tax imposed by the State of Mississippi and a tax, if paid by this tax payer, which was a deductable item from the amount of profits upon which it would make return and pay the income tax to the United States Government. That having accrued the tax for the year 1937, in making its returns for the payment of the income tax to the United States Government, it deducted the amount of the tax so assessed and so accrued by it as being payable to the State of Mississippi, in accordance with the assessment made by the proper state authorities of the State of Mississippi.

This tax payer would show that in 1938, when the Supreme Court had finally passed upon the liability of this tax payer for the tax so assessed against it by the State of Mississippi, this tax payer took into account as a recovery the amount of tax so assessed against it by the State of Mississippi for the year 1937, and for which it had taken deduction in its return to the United States Government for income tax purposes.

This tax payer would show that the amount of the solvent gasoline tax levied by the State of Mississippi was $20,839.38, which said amount was accrued by this tax payer to be paid to the State of Mississippi in the event it lost its case before the Supreme Court. When the Supreme Court decided in this tax payer's favor in 1938, this tax payer took the said sum of $20,839.38 back into its profit and loss account and made return thereon and included the said amount in its return for the year 1938. [fol. 5] This tax payer would show that the Internal Revenue Agent in Charge has disallowed the said sum of $20,839.38 accrued for the year 1937, both in 1937 and 1938 and has assessed this additional tax of $4770.04 against this tax payer.

From the action of the Internal Revenue Agent in Charge at New Orleans, Louisiana, this tax payer files this petition for an appeal and a review before this Board of the action and prays this Board to consider this appeal, and upon a final hearing to reverse the decision of the Internal Revenue Agent in charge and the Technical Staff of the Southwestern Division and hold that this tax payer was correct in its accrual charges and is not liable for the said additional tax so charged against it.

As provided by law a certified check of $10.00 as a filing fee is enclosed herewith, as is required by the Revenue Act of 1934 and 1936.

R. G. Wooton, Attorney for tax payer, Carter Bldg., Hattiesburg, Miss. T. J. Wills, Hattiesburg, Miss., of Counsel.

Duly sworn to by T. F. Dreyfus. Jurat omitted in printing.

[fol. 6] BEFORE UNITED STATES BOARD OF TAX APPEALS

AMENDED PETITION—Received June 15, 1940

Filed June 15, 1940

[Title omitted]

The above-named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency

dated April 15th, 1940, and as a basis of his proceeding alleges as follows:

1. The petitioner is a corporation with principal office at Dixie Pine, Hattiesburg, Mississippi. The return for the period here involved was filed with the collecto for the State district of Mississippi.

2. The notice of deficiency (a copy of which is attached and marked Exhibit A) was mailed to the petitioner on April 15th, 1940.

[fol. 7] 3. The taxes in controversy are income taxes for the calendar year 1937 and in the amount of Four thousand seven hundred seventy dollars and four cents ($4770.04).

4. The determination of tax set forth in the said notice of deficiency is based upon the following errors:

A claim of a credit on the return for Twenty thousand eight hundred thirty-nine dollars and thirty-eight cents ($20,839.38) imposed by the Law of the State of Mississippi on gasoline and assessed against this petitioner by the Motor Vehicle Commissioner of the State of Mississippi, authorized to assess and collect tax on gasoline and petroleum products and which this petitioner had accrued during the year 1937, for the tax so levied and demanded for the year 1937 has been disallowed by the Internal Revenue Agent in charge of the New Orleans division, located at New Orleans, Louisiana, and the disallowance approved by the Board of Conferees of the Internal Revenue Agents for the Southwestern division.

5. The facts upon which the petitioner relies as the basis of this proceeding are as follows:

The petitioner operates its business upon an accrual basis so that its fixed charges to profit and loss are accrued monthly, 1/12 of the total amount so charged to petitioner to be paid from its profit and loss account is charged each month during the calendar year. That during the year 1937 the State of Mississippi imposed a tax upon the solvent used by this petitioner in the operation of its business of extracting rosin from pine wood in its plant located at Hattiesburg, Mississippi. That this petitioner contested the tax so imposed but since the tax assessment was made by the proper official of the State of Mississippi, with the power under the statutes of said

State, to collect the same by distress without other or [fol. 8] further legal proceedings, this petitioner accrued the tax so assessed against it by the State of Mississippi.

That this petitioner litigated with the State of Mississippi, the legality of the assessment of the tax so made and in December of 1938 was successful in having the Supreme Court of the State of Mississippi hold that the said tax was not a proper charge against this petitioner.

This petitioner would show that the said solvent tax, herein referred to, was a tax imposed by the State of Mississippi and a tax, if paid by this petitioner, would be a deductable item from the amount of profits upon which it would make return and pay the income tax to the United States Government. That having accrued the tax for the year 1937, in making its returns for the payment of the income tax to the United States Government, it deducted the amount of the tax so assessed and so accrued by it as being payable to the State of Mississippi, in accordance with the assessment made by the proper state authorities of the State of Mississippi.

This petitioner would show that in 1938, when the Supreme Court had finally passed upon the liability of this petitioner for the tax so assessed against it by the State of Mississippi, this petitioner took into account as a recovery the amount of tax so assessed against it by the State of Mississippi for the year 1937, and for which it had taken deduction in its return to the United States Government for income tax purposes.

This petitioner would show that the amount of the solvent gasoline tax levied by the State of Mississippi was $20,839.38, which said amount was accrued by this petitioner to be paid, to the State of Mississippi in the event it lost its case before the Supreme Court. When the Supreme Court decided in this petitioner's favor in 1938, this petitioner [fol. 9] took the said sum of $20,839.38 back into its profit and loss account and made return thereon and included the said amount in its return for the year 1938.

This petitioner would show that the Internal Revenue Agent in Charge has disallowed the said sum of $20,839.38 accrued for the year 1937, both in 1937 and in 1938 and has assessed this additional tax of $4770.04 against this petitioner.

Wherefore, the petitioner prays that this Board may hear the proceeding and may reverse the decision of the Internal Revenue Agent in Charge and disallow the assessment so made against this petitioner.

R. J. Wooton, Counsel for Petitioner.

Hattiesburg, Mississippi.
T. J. Wills, of Counsel.

Duly sworn to by T. F. Dreyfus.
Jurat omitted in printing.

[fol. 10] EXHIBIT "A" TO AMENDED PETITION

Treasury Department,
Internal Revenue Service,
New Orleans, Louisiana.

Office of Internal Revenue Agent in Charge, New Orleans Division.

April 15, 1940.

Dixie Pine Products Company, Hattiesburg, Mississippi.

SIRS:

You are advised that the determination of your income tax liability for the taxable year ending December 31, 1937 discloses a deficiency of $3,600.09 and that the determination of your excess-profits tax liability for the year mentioned discloses a deficiency of $1,169.95 as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiencies mentioned.

Within 90 days (not counting Sunday or a legal holiday in the District of Columbia as the 90th day) from the date of the mailing of this letter, you may file a petition with the United States Board of Tax Appeals for a redetermination of the deficiencies.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Internal Revenue Agent in Charge, New Orleans, Louisiana for the attention of —. The signing and filing of this form will expedite the closing of your return by permitting

an early assessment of the deficiencies, and will prevent the [fol. 11] accumulation of interest, since the interest period terminates 30 days after filing the form, or on the date assessment is made, whichever is earlier.

Respectfully, Guy T. Helvering, Commissioner by William E. Logan, Internal Revenue Agent in Charge.

Enclosures: Statement. Form of waiver.

STATEMENT

Dixie Pine Products Company, Hattiesburg, Mississippi

Tax Liability for Taxable Year Ended December 31, 1937

	Liability	Assessed	Deficiency
Income Tax	$9,340.89	$5,740.80	$3,600.09
Excess-Profits Tax	$1,175.87	$ 5.92	$1,169.95

In making this determination of your income and excess-profits tax liability, careful consideration has been given to the report of examination dated June 8, 1938; to your protests dated September 8, 1938 and March 13, 1939; to the statements made at the conference held on March 14, 1939, April 17, 1939 and March 13, 1940; and to your communications dated April 19, 1939, April 29, 1939 and March 21, 1940.

[fol. 12] Adjustments to Net Income

Net income as disclosed by return		$ 46,011.23
Unallowable deduction and additional income:		
(a) Solvent taxes disallowed	$20,839.38	
(b) Interest	.74	20,840.12
Total		$ 66,851.35
Additional deductions:		
(c) Depreciation		1,264.09
Net income adjusted		$ 65,587.26

Explanation of Adjustments

(a) Before the accrual of an expense item can be allowed as a deduction for the year in which accrued, it must be shown to the satisfaction of the Commissioner that such

an accrual represents an actual liability. In view of the fact that while you accrued as of December 31, 1937 the gasoline tax of six cents a gallon claimed by the State of Mississippi as due on the 347,323 gallons of solvent used by you in your manufacturing operations, you denied the liability and were as of the same date seeking by legal processes to have the tax declared to be not applicable to you, the Bureau holds that the existence of an actual liability to pay the tax has not been established and that the item in question is therefore not allowable.

(b) This item represents interest on refund of Federal income tax.

(c) Depreciation on Plant and Equipment has been adjusted as follows:

Balance per books January 1, 1937		$540,248.63
Less: Appreciation		161,791.90
[fol. 13]		
Balance		$378,456.73
1937 Additions		5,294.07
Total		$383,750.80
Less: Land cost (plant site)		28,500.00
Balance		$355,250.80
Less:		
Estimated salvage 2½%	$ 8,881.27	
Reserve for depreciation as amended, December 31, 1936	160,544.50	169,425.77
Amount subject to depreciation		$185,825.03
Depreciation allowable (1/9 of $185,825.03)		$ 20,647.23
Depreciation deducted per return		19,383.14
Additional deduction		$ 1,264.09

Adjustment to Value of Capital Stock as Declared in your Capital Stock Tax Return for Year Ended June 30, 1937.

Value declared in return	$459,124.95
Increase in net income for income tax computation for year ended December 31, 1936	769.88
Value as adjusted	$459,894.83

Explanation of Adjustment

Net income for normal tax computation	$ 31,869.83
Less: Excess-profits tax	None
Net income for normal tax computation	$ 31,869.83
Less: Net income reported	31,099.95
Increase	$ 769.88

[fol. 14] Computation of Tax

Excess-profits Tax:	
Taxable net income	$ 65,587.26
Less: 10% of $459,894.83 value of capital stock as declared in your capital stock tax return for year ended June 30, 1937	45,989.48
Net income subject to excess-profits tax	$ 19,597.78
5% of declared value of capital stock	22,994.74
Balance	None
Excess-profits tax: 6% of $19,597.78	$ 1,175.87
Total excess-profits tax	$ 1,175.87
Excess-profits tax assessed: Original, account No. 40342	5.92
Deficiency of excess-profits tax	$ 1,169.95
Income Tax:	
Normal tax: Taxable net income	$ 65,587.26
Less: Excess-profits tax	1,175.87
Net income for normal tax computation	$ 64,411.39
Normal tax net income	$ 64,411.39
8% of $ 2,000.00 (Over 0 to $2,000.00)	$ 160.00
11% of $13,000.00 (Over $2,000.00 to $15,000.00)	1,430.00
13% of $25,000.00 (Over $15,000.00 to $40,000.00)	3,250.00
15% of $24,411.39 (Over $40,000.00)	3,661.71
Total normal tax	$ 8,501.71

Surtax on Undistributed Profits:		
Taxable net income		$ 65,587.26
Less:		
[fol. 15]		
Excess-profits tax	$1,175.87	
Normal tax	8,501.71	9,677.58
Adjusted net income		$ 55,909.68
Less: Dividends paid credit		46,587.00
Undistributed net income		$ 9,322.68
7% of $5,590.97		391.37
12% of $3,731.71		447.81
Total surtax		$ 839.18
Total normal tax		8,501.71
Total income tax (normal tax and surtax)		$ 9,340.89
Income tax assessed: Original, account No. 40342		5,740.80
Deficiency of income tax		$ 3,600.09

BEFORE UNITED STATES BOARD OF TAX APPEALS

ANSWER TO AMENDED PETITION—Filed August 2, 1940

Received August 2, 1940

[Title omitted]

Comes now the Commissioner of Internal Revenue, by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and for answer to the amended petition filed herein admits and denies as follows:

1. Admits the allegations contained in paragraph 1 of the amended petition.

[fol. 16] 2. Admits the allegations contained in paragraph 2 of the amended petition.

3. Admits the allegations contained in paragraph 3 of the amended petition.

4. Denies that respondent's determination is based on errors as alleged in paragraph 4 of the amended petition.

5. Denies the material allegations of fact set forth in paragraph 5 of the amended petition.

Denies generally and specifically each and every allegation contained in the amended petition not hereinbefore specifically admitted, qualified, or denied.

Wherefore, it is prayed that the appeal be denied.

(Signed) J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue.

JHY

Of Counsel: James L. Backstrom, Division Counsel, Donald P. Moyers, Special Attorney, Bureau of Internal Revenue.

JHY:mkm. 7/29/40.

[fol. 17] PETITIONER'S EXHIBIT ONE

U. S. Board of Tax Appeals, Div. 3, Docket 103015

Admitted in Evidence Jan. 29, 1941

No. —

In the Chancery Court of Forrest County, Mississippi

DIXIE PINE PRODUCTS COMPANY, a Corporation, Complainant,

vs.

HOWARD DYER, Commissioner, Defendant

BILL OF COMPLAINT

To the Honorable Chancery Court of the Tenth Chancery District in and for Forrest County and State of Mississippi, the Honorable Ben Stevens, Chancellor:

Comes the Dixie Pine Products Company, a corporation, by its attorney, and complains of Howard Dyer, Commissioner, and for grounds of equitable relief, most respectfully shows unto the Court the following facts, to-wit:

The complainant herein is a corporation, incorporated under the laws of the State of Mississippi, with its principal

place of business in Hattiesburg, Forrest County, Mississippi. That as a corporation, its principal business is the manufacture of turpentine, pine oil and rosin from pine stumps taken from the lands in the territory surrounding and adjacent to the City of Hattiesburg.

That the defendant herein named is the Motor Vehicle Commissioner, duly appointed, qualified and acting, under the provisions of House Bill No. 94, being chapter 162 of the Acts of the regular 1936 session of the Legislature of the State of Mississippi. That the said defendant, as Commissioner, is charged with the duties specified in the aforementioned Act of the Legislature and has associates and [fol. 18] deputies working under him and under his direction, in accordance with the provisions of said law.

Complainant would show that it is engaged, as aforesaid, in the manufacture of turpentine, pine oil and rosin from the pine stumps taken from the ground in the territory adjacent to the City of Hattiesburg.

Complainant would further show that in the reduction of the said stumps and the distillate of the turpentine, pine oil and rosin and from the said stumps, it has a large plant, representing a very heavy investment, located in or near the city of Hattiesburg where it receives the said stumps delivered to its plant by the farmers and land owners in the territory adjacent to the City of Hattiesburg. That the said stumps so used in the manufacture of the said turpentine, pine oil and rosins, aforesaid, are removed from the farm lands in the clearing and preparation of the same for agricultural purposes and for the purpose of clearing uncleared lands of the said stumps. That in the use of and reduction of the said pine stumps in the distillation of the turpentine, pine oil and rosin, complainant is engaged in utilizing a waste product and making commercially valuable that which heretofore had been a liability to the land owners and expensive in removing the same from the lands. Complainant, by the process of distillation, and in the manufacture of said stumps, has turned into an asset for the farmers and land owners, who are now removing their stumps from their lands and obtaining a market therefor, sufficient to pay for the removal of the stumps and a small profit on the labor expended in so doing.

Complainant would further show that in the distillation of the stump wood, so as to obtain the turpentine, pine oil

and rosin therefrom, it feeds the said stumps into a machine, commonly called a Hog, which ships the said stumps [fol. 19] into small chips and shavings. These chips and shavings are subjected to an application of steam of a high temperature which takes out of the said chips and shavings the turpentine and pine oil, and thereafter, for the purpose of removing the rosin from the said chips, it is necessary for the chips and shavings to be treated by a solvent, or reducing agent. That for the purpose of so reducing the said chips and shavings and extracting the rosin therefrom, that complainant has a battery of reservoirs or tanks, holding from forty thousand to sixty thousand gallons of the solvent or reducing agent, into which the said chips and shavings are placed for the purpose of dissolving the rosin and extracting the same from the said chips and shavings.

Complainant would further show that, as a solvent to be used in the extracting or reducing the said chips and shavings, so as to obtain the resin therefrom, complainant has contracted with a refinery to manufacture a special liquid, designated as turpentine and rosin solvent, to be used by it in extracting and reducing the rosin out of and from the said chips and shavings.

Complainant would show that the said solvent is a petroleum product with a specific gravity of .56, at a temperature of 60 degrees fahrenheit. That the said solvent is a petroleum product; that it has a boiling range beginning at 230 degrees fahrenheit and vanishing at 290 degrees fahrenheit, so that the boiling range covers a variation in temperature of 60 degrees.

Complainant would further show that, in using the said solvent as a reducing agent, that it is necessary to distil the said solvent off and leave the said resin, and that said solvent is distilled off from the said rosin and does not form any part of the said products so being manufactured and in no wise becomes mixed with or a part of the said [fol. 20] rosin that is manufactured and sold on the market by complainant as a part of its manufactured product. That the said reducing agent has a boiling point above the boiling point of the turpentine and pine oil so that said solvent and pine products can be separated by the distilling process aforesaid. That in using the said solvent and distilling the same off there is a waste or loss of about five

gallons for each ton of wood, from which rosin is extracted by the complainant in its manufacturing plant. That complainant uses and extracts the turpentine, pine oil and rosin from about one hundred and twenty tons of pine stumps and wood each day, so that there is a loss or a waste of about six hundred gallons per day of the said solvent so used by complainant in its manufacturing operations.

Complainant would further show that it does not keep the said solvent in storage. That as it manufactures the said stumps and pine wood and as the said solvent is lost and wasted, at the rate of approximately six hundred gallons per day, as aforesaid, that it refills the containers from tank cars received from the refinery. That when the loss amounts to approximately ten thousand gallons and becomes so lowered in the retort as to make it necessary to replenish, that complainant imports from the said refinery, from without the state, in interstate commerce, over the railroad lines operating into Hattiesburg, as common carriers, a tank car of the said solvent, which is placed in the retort, refilling the retort to the desired amount to be used therein, which said amount is from forty thousand to sixty thousand gallons, as hereinbefore set forth.

Complainant would further show that it does not use the said solvent on the streets, public roads or highways of the State of Mississippi. It does not use the said solvent in an internal combustion engine and it does not sell, de- [fol. 21] liver or otherwise dispose of the said solvent; that it uses it only in the retorts, which are stationary, holding the said solvent through which the said chips and shavings of the said pine stumps and wood, as hereinbefore set out, are passed, for the purpose of dissolving the rosin therefrom.

Complainant would further show that gasoline usable in motor driven vehicles or internal combustion engines, has a boiling range beginning at 80 degrees fahrenheit and extends to 420 degrees fahrenheit, having a boiling range of 340 degrees, whereas the solvent used by this complainant, in its tanks and retorts for the extraction of the rosin from the pine chips and shavings, as hereinbefore set forth, has a boiling range of only 60 degrees running from 230 degrees fahrenheit to 290 fahrenheit, as hereinbefore set forth.

Complainant would further show that, because of the loss of the solvent, as hereinbefore set forth, in the extraction and reduction of the rosin in its manufacturing plant, it becomes necessary for this complainant to use large quantities of said solvent, ranging from fifteen thousand to twenty thousand gallons per month. That the said solvent is recaptured, as far as is possible, in the said operations, the said loss, however, amounts to approximately six hundred gallons per day, as hereinbefore set forth. That the loss, because of inability to recapture all of said solvent, is a total loss to complainant and is a manufacturing cost of said rosin so made by complainant. That the said solvent so lost, however, does not enter into nor become any part of the manufactured product, and the loss, therefore, is not in any wise compensated by increase in quantity nor in the price of the commodity manufactured and sold and no part of the said solvent is sold and no remuneration in any wise whatsoever is received therefor.

[fol. 22] Complainant would show that the defendant herein is the Motor Vehicle Commissioner, appointed by the Governor of the State of Mississippi, under the laws of the State, and as hereinbefore set forth, is duly qualified and acting as said Commissioner in the collection of the tax imposed upon gasoline and oils by the said Chapter 162 of the Mississippi Laws 1936. That in construing the said statute the said Commissioner has classified complainant as a distributor of gasoline under the provisions of section 5, paragraph (e) of the aforementioned Acts.

Complainant would further show that the said Commissioner, in his construction of section 8, paragraph (a), has assessed and is attempting to collect a tax of six cents per gallon on the solvent so used by the complainants in the manufacture of its turpentine, pine oil and rosin, as hereinbefore set forth. Complainant would show further that under section 6, the Commissioner is demanding that complainant shall make application to the Commissioner, upon the forms prescribed by him, and execute a bond, required by law, and to otherwise comply with the provisions of the statute, required of persons, firms or corporations, who are distributors, to qualify as a distributor of gasoline and to receive a permit to authorize complainant to engage in business as a distributor, as provided by section 7 of the said laws, hereinbefore referred to. And the said defendant seeks to compel complainant to so qualify before

complainant is permitted to receive and use the said solvent in its manufacturing business, as hereinbefore set forth.

Complainant would further show that it has received a car of the said solvent, shipped by the Refinery from Wichita Falls, Texas, shipped on July 28th, 1936, in car G. A. T. X. No. 2423, moving in interstate commerce and into Hattiesburg over the Mississippi Central Railroad, containing 7906 gallons of the said solvent. That the said solvent, when received, was immediately pumped into the [fol. 23] retorts of its system and used as a solvent therein. That the said Commissioner now seeks to impose the said tax of six cents per gallon on said solvent and to collect from complainant the sum of $474.36.

Complainant would further show that the said Commissioner denies to complainant the right, should complainant pay the said tax imposed thereon, of receiving a refund of the amount of tax paid, less one cent per gallon, unless complainant shall conform to the regulations provided in section 15, with all of its sub-divisions therein contained, of the said Laws, hereinbefore referred to.

Complainant would show that the said solvent that it is using is not gasoline, within the definition of section 5, paragraph (a) of the Laws of the State of Mississippi, Chapter 162, Acts of 1936, in that the said solvent is not used or usable in propelling motor vehicles, when used alone, and is not a liquid that is ordinarily and practically commercially usable in internal combustion engines for the generation of power, neither is it a distillate or a condensate of petroleum, natural gas, coal, coal tar, vegetable ferments and other products so usable in said internal combustion engines for the generation of power. Complainant reiterates, however, that the said solvent is a petroleum product and has a gravity test above 46 degrees Tagliaubes baume scale, at a temperature of 60 degrees fahrenheit. Complainant would show, however, that the said solvent could be mixed or blended with other petroleum products so as to make it usable in motor vehicles. To so make it usable a petroleum product with a boiling range beginning at 80 degrees fahrenheit, and vanishing at 230 degrees fahrenheit, and also a petroleum product with a boiling range beginning at 290 degrees fahrenheit and vanishing at 420 degrees fahrenheit, must be mixed or blended with said solvent. The mixing of said solvent with the two above described products, in the proper pro-

[fol. 24] portions, would make a petroleum product usable in motor vehicles or internal combustion engines, but complainant is not advised as to the proportions of each necessary to be used in mixing or compounding the same.

Complainant would further show that it is not a distributor, as defined by section 5, paragraph (e) of the above-mentioned laws, in that it does not sell or distribute gasoline or oil or the solvent in question for re-sale; that it does not manufacture, refine, distil, blend or compound gasoline or the said solvent, in this state, and complainant further shows that it is not importing, receiving, purchasing, acquiring, using, storing or selling gasoline or oil or the said aforesaid solvent in this state, on which a fuel excise tax has been imposed by the said Act; therefore, complainant is not using a product of petroleum on which a tax is imposed and which tax has not been paid or a bond to cover the payment thereof, has been made by a qualified distributor.

Complainant would show that, by section 8, paragraph (a) thereunder, that any person engaged in business as a distributor, as defined in the Act, shall pay for the privilege of engaging in such business, an excise tax equal to and imputed as follows:

(a) Six cents (6c) per gallon on all gasoline stored, sold, distributed, manufactured, refined, distilled, blended or compounded or received in the state for sale, use on the highways, storage, distribution, use in internal combustion engines or for any commercial purpose. Complainant would show that the solvent herein sought, by the Commissioner, to be classified as a gasoline, is received by it in this state for its sole and only use, but that the said solvent is not used on the highways and is not used in internal combustion engines or for any commercial purpose. It is not stored nor distributed and, therefore, the [fol. 25] said solvent is not subject to the six cents (6c) tax imposed and is not included by the said statute, as being subject to the tax imposed, if, in all other respects, it came within the purview of the statute; for the reason that it is received by complainant from without the state, shipped in interstate commerce, for complainant's sole and only use, which use is not upon the highways or in internal combustion engines or commercial purposes, but as a solvent as is specifically hereinbefore set forth.

Complainant would show therefore that in addition to the fact that the said solvent, so used by it, is not gasoline, within the definition of section 5, paragraph (a) of the said Act, that if and should it be construed that the said definition referred to, is broad enough to include the said solvent, then the tax does not apply for the reason that it is received from without the state, in interstate commerce, to be used by the complainant in its own business and not upon the streets, public roads and highways of the state, nor in internal combustion engines or for commercial purposes and for that reason the said tax does not apply. The tax not applying to the said solvent, complainant is not a distributor within the definition of section 5, paragraph (e) of the said Act for the reason that the said solvent, so received and used by complainant, is not one on which a fuel excise tax, imposed by the Act; and is not a solvent on which an excise tax, imposed by the Act, has not been paid.

Complainant would further show that it cannot make application for a permit, as a distributor under section 6 of said Act, for the reason that it does not sell gasoline or oil and not selling gasoline or oil it could not approximate the amount expected to be sold monthly, as required by the Act, and, therefore, the application required by the statute, could not be made by complainant for a permit authorizing it to engage in business as a distributor.

[fol. 26] Complainant would show that it cannot establish a basis for a refund on the solvent used so as to obtain the refund of the excise tax of six cents less one cent per gallon, if the said excise tax of six cents per gallon were paid. That in order to establish a basis for a refund it would be necessary for complainant to fill out and file with the Commissioner an information blank, furnished by the Commissioner, giving a detailed description of the make, model, motor number, horsepower and the approximate per hour gasoline consumption of the machinery in which complainant intends to use the refund gasoline and in addition thereto to make an estimate of the amount of refund gasoline it intends to use each month, during the succeeding year. Since the solvent is not used in any machinery, internal combustion engine or for any other purpose, to generate power, there is no basis upon which complainant could establish the right to receive a refund for the said

tax, if it were required to or should voluntarily pay the same.

Complainant would further show that by section 35, of the aforementioned Act, the Legislature declared that, "for the purpose of this Act it will be prima facie presumed that all gasoline and oil, or either, as defined herein, imported, received, purchased, acquired, used, stored, manufactured, refined, distilled, blended, compounded, sold or distributed in the state, is intended for use in propelling motor vehicles on the public roads and highways and the tax liability in this Act is based on such presumption. "The Legislature thereby clearly showed an intention on its part to place an interpretation upon the excise tax so imposed as being for the use of the highways and in aid of the state roads.

Complainant would further show that the said Commissioner, using the prima facie presumption of the statute, is prima facie presuming that the said solvent, used by [fol. 27] complainant, is used on the highways. The defendant, therefore, is attempting to impose and collect the said tax on said solvent from complainant. The prima facie presumption must yield to the facts and the facts are that the said solvent is not used on the highways, in any sense and is used only in the crucible as a solvent and reducing agent for the extraction of turpentine and rosin from pine stumps and pine wood found only in the pine belt of the State of Mississippi, which has been denuded of its virgin timber.

Complainant would further show that it is not due the said six cents excise tax on the carload of solvent, containing 7906 gallons, hereinbefore set forth. The Commissioner has made demand on complainant for the payment of said tax, and will collect the same, unless he is restrained from so doing. That if the said excise tax is collected an irreparable injury will be inflicted upon complainant for the reason that it has not established a basis for a refund of the tax paid, less one cent per gallon thereon, and, therefore, it will sustain an operating loss to that extent. An irreparable injury would be sustained by complainant for the further reason that there is no provision of statute made for complainant to recover back the said sum of money so wrongfully collected from complainant.

Complainant would show that unless the said Commissioner is restrained from collecting the said tax that he will proceed to collect the same.

Complainant would show that the said laws, under consideration, are not to be interpreted so as to apply to the said solvent but if interpreted to apply to the solvent being used by complainant, it would render the said law violative of the constitution of the State of Mississippi and violative of the constitution of the United States, which [fol. 28] said unconstitutionality of the said Act, should such construction be placed thereon, by the Courts, is here specifically pleaded and relied on.

Wherefore the premises considered complainant prays that upon a hearing of this motion and bill of complaint that the Court may issue a temporary injunction, restraining the said Commissioner from collecting or attempting to collect the said excise tax from complainant on the solvent so used by it in the Manufacture of its products; that the proper process of the Court may issue, commanding the defendant to appear on a day certain, to plead, answer or demur to the material allegations of this bill of complaint, but not under oath, answer under oath being specifically waived; that upon a final hearing may the Court interpret the said statute and hold that complainant is not liable for the excise tax on the solvents used by it in the manufacture of its turpentine, pine oil and rosin, as set forth in this bill of complaint. And on a final hearing may the Court make the said temporary injunction, so issued, perpetual, forever enjoining the said Commissioner from collecting or attempting to collect an excise tax on the solvent so received by complainant, and used by it in its crucibles and retorts as a solvent and reducing agent, when not used on the highways of the State of Mississippi or in internal combustion engines or to be mixed, blended or compounded for such use, and if mistaken in the relief prayed for complainant prays the Court to grant unto it such other, further, general or special relief in the premises as, under all the facts and circumstances, herein set forth, it may be entitled to receive, and if it has prayed for an improper relief or the proper relief in an improper manner, then may the Court look through the form of the petition herein filed to the substance thereof and grant unto complainant such relief in

the premises, as under all of the facts set forth it may [fol. 29] be entitled to receive, whether specifically prayed for or not, and as to the Court may seem meet and proper; and as in duty bound complainant will ever pray.

Dixie Pine Products Company, by T. J. Wills, Attorney.

STATE OF MISSISSIPPI,
Forrest County.

Personally appeared before me, the undersigned authority in and for said county and state, T. J. Wills, who being first duly sworn, says on oath that he is the attorney for the Dixie Pine Products Company, a corporation, and as such attorney he is authorized, under the law to make oath to the above and foregoing bill of complaint, and affiant says that the matters and things set forth in the foregoing bill of complaint are true and correct, as therein stated.

T. J. Wills.

Sworn to and subscribed before me on this the 6th day of August, 1936. —— ——, Notary Public.

[fol. 30] PETITIONER'S EXHIBIT 2

U. S. Board of Tax Appeals, Div. 3, Docket 103015

Admitted in Evidence Jan. 29, 1941

No. 23438½

DIXIE PINE PRODUCTS COMPANY, a Corporation, Complainant,

vs.

HOWARD DYER, Commissioner, Defendant

FINAL DECREE

This cause coming on this term day to be heard on final hearing on original bill of complaint and demurrer by agreement of both parties and their attorneys of record,

and the Court having heard and duly considered the same, and being of the opinion that the demurrer to the original bill of complaint should be sustained and the bill dismissed.

It is, therefore, ordered, adjudged and decreed that the demurrer of Howard Dyer, Commissioner, defendant in the above styled cause, to the original bill of complaint of Delta Pine Products Company, a corporation, complainant, be and the same is hereby sustained, and complainant having declined to plead further, complainant's original bill of complaint is hereby dismissed with prejudice, to which action complainant excepts and prays for an appeal, which is hereby granted.

It is further ordered, adjudged and decreed that complainant pay all costs, for which let execution issue.

Ordered, adjudged and decreed this the 15 day of August, 1936.

——— ———, Chancellor.

[fol. 31] PETITIONER'S EXHIBIT 3

U. S. Board of Tax Appeals, Div. 3, Docket 103015

Admitted in Evidence Jan. 29, 1941

In the Chancery Court of the First Judicial District of Hinds County, Mississippi

DIXIE PINE PRODUCTS COMPANY, a Corporation, Complainant,

vs.

HOWARD DYER, Commissioner, Defendant

ANSWER TO BILL OF COMPLAINT

And now comes defendant, Howard Dyer, Commissioner, and in answer to complainant's bill of complaint would show this Honorable Court the following:

Defendant admits that complainant is a corporation incorporated under the laws of the State of Mississippi with principal place of business in Hattiesburg, Mississippi, and

that complainant is engaged in the manufacture of turpentine, pine oil and rosin from pine stumps.

Defendant admits that he is the duly appointed qualified and acting Motor Vehicle Commissioner and as such is charged with the duties specified in Chapter 162 of the 1936 Regular Session Laws of the Missippi Legislature.

Defendant admits that complainant is engaged in the manufacture of turpentine, pine oil and rosin from pine stumps in Mississippi and that some of said products are sold in export trade and shipped to foreign countries, but avers that many of said products are sold in Mississippi for use in Mississippi.

[fol. 32] Defendant admits the method of manufacturing turpentine, pine oil and rosin, which is set out in paragraphs 5 and 6 of complainant's bill of complaint.

Defendant neither admits nor denies that complainant has contracted with a refinery to manufacture a special liquid designated as turpentine and rosin solvent to be used by complainant in the manufacture of turpentine, pine oil and rosin, but denies that said solvent is not generally manufactured and sold on the market.

Defendant admits that said solvent used by complainant is a petroleum product with a specific gravity of 56 degrees T. B. scale at a temperature of 60 degrees Fahrenheit, and that it has a boiling range beginning at 230 degrees Fahrenheit and vanishing at 290 degrees Fahrenheit.

Defendant admits that in using said solvent as a reducing agent it is necessary to distill the said rosin off and leave the said solvent, and that said rosin is distilled off from the said solvent and the said solvent does not form any part of the product being manufactured and sold on the market by complainant. Defendant neither admits nor denies that there is a loss of five gallons of solvent for each ton of wood treated, and neither admits nor denies that there is a loss or waste of about six hundred gallons per day of said solvent by complainant in its manufacturing operations.

Defendant denies that complainant does not keep the said solvent in storage, but avers that said solvent is kept by complainant in reservoirs and tanks in the State of Mississippi and that such keeping amounts to a storage within the meaning of Chapter 162 of the 1936 Laws of

Mississippi. Defendant admits that complainant imports its solvent from without the State of Mississippi in interstate commerce into Hattiesburg, Mississippi, but avers [fol. 33] that said solvent comes to rest in Hattiesburg, Mississippi, where its interstate journey ceases, and that after having come to rest it is received and stored by complainant in the State of Mississippi.

Defendant admits that the complainant does not use said solvent on the streets, public roads or highways of the State of Mississippi, nor in an internal combustion engine, but denies that complainant does not use said solvent for a commercial purpose. In this connection, defendant avers that said solvent is used by complainant for a commercial purpose within the meaning of Section 8, Sub-section (a), Chapter 162 of the Mississippi Laws of 1936, in that said solvent is used in the manufacture of turpentine, pine oil and rosin by complainant, and that after said products have been manufactured they are sold by complainant on the open market. Defendant alleges that complainant's business is that of manufacturing and selling turpentine, pine oil and rosin, and that the solvent is used by complainant in furtherance of this business.

Defendant denies that gasoline usable in motor-driven vehicles or internal combustion engines has a boiling range beginning at 80 degrees Fahrenheit and extending to 420 degrees Fahrenheit, having a boiling range of 340 degrees, but avers that gasoline as defined in Section 5 of Chapter 162 of the 1936 Laws of Mississippi include petroleum products such as the solvent used by the complainant which has a boiling range of only 60 degrees, running from 230 degrees Fahrenheit to 290 degrees Fahrenheit.

Defendant neither admits nor denies that complainant uses large quantities of said solvent, nor does defendant admit or deny that said solvent is recaptured. Defendant admits that the solvent does not become a part of the manufactured product and admits that the manufactured [fol. 34] product of turpentine, pine oil and rosin is sold by complainant on the market.

Defendant admits that he, as Motor Vehicle Commissioner, of Mississippi, has construed Chapter 162 of the 1936 Laws of Mississippi as including and classifying complainant as a distributor of gasoline under the provisions

of Sub-section 3 of paragraph (e) of Section 5 of Chapter 162 of the 1936 Laws of Mississippi.

Defendant admits that he, as Motor Vehicle Commissioner, in his construction of Section 8, Paragraph (a) of Chapter 162 of the 1936 Laws of Mississippi is attempting to collect a tax of 6¢ per gallon on the solvent used by complainant in the manner set out in complainant's bill of complaint.

Defendant admits that he, as Motor Vehicle Commissioner, has demanded that complainant comply with said Chapter 162 as a distributor within the meaning of said chapter. Defendant avers that complainant is a distributor within the meaning of sub-section 3 of paragraph (e) of Section 5 of said Chapter 162 of the 1936 Laws of Mississippi, for the reason that complainant has imported, received, acquired, used and stored in Mississippi gasoline on which the fuel excise tax imposed by Chapter 162 has not been paid, and the payment of which tax has not been covered by the bond of a qualified Mississippi distributor. Defendant further avers that by virtue of being a distributor under said Chapter 162 complainant should be made to comply with the various provisions of said chapter governing distributors.

Defendant admits that complainant received a car of the said solvent shipped by a refinery from Wichita Falls, Texas, on July 28th, 1936, in car G. A. T. X. No. 2423 over the Mississippi Central Railroad, containing 7906 gallons [fol. 35] of said solvent. Defendant admits that said solvent was received by complainant in Mississippi and was pumped immediately into the tanks of complainant in Mississippi. Defendant avers that on being received by complainant in Mississippi and placed in complainant's tanks that the solvent ceased its interstate journey and came to rest in Mississippi. Defendant further avers that after said solvent had come to rest in Mississippi and had been received by complainant that it was stored within the meaning of Chapter 162 in complainant's tanks and reservoirs in Mississippi. Defendant admits that he is seeking to impose a tax of 6¢ per gallon on said solvent and to collect from complainant the sum of $474.36, and avers that complainant owes said sum to the State of Mississippi by virtue of the fact that said sum is imposed as a tax and penalty on complainant under Chapter 162 of the 1936 Laws of

Mississippi for the reason that complainant by receiving said car became a distributor and that complainant did not pay the said tax owed on said solvent within the time required by law, or at any time. Defendant admits that said solvent was not purchased from a qualified Mississippi distributor, and that no tax has been paid on said solvent, and that the payment of said tax is not covered by the bond of a qualified Mississippi distributor as the term "distributor" is defined in Chapter 162, Laws of 1936.

Defendant denies that complainant should not pay to defendant the said tax imposed on said solvent, but avers that said tax, plus a penalty of twenty-five per cent thereon, is due by complainant to defendant under said Chapter 162.

Defendant admits that should complainant pay the said tax that defendant would require complainant to conform to all of the provisions of Section 15 of Chapter 162 of the 1936 Laws of Mississippi before defendant would grant any refund on said solvent.

[fol. 36] Defendant denies that said solvent is not gasoline within the definition of Section 5, Paragraph (a), Chapter 162 of the 1936 Laws, and denies that said solvent is not usable in propelling motor vehicles when used alone and denies that it is not a liquid that is ordinarily and practically commercially usable in internal combustion engines for the generation of power, and denies that it is not a distillate or condensate of petroleum so usable in said internal combustion engines for the generation of power. In this connection, defendant avers that said solvent is gasoline within the definition of said Chapter 162, and avers that said solvent is a liquid petroleum fuel that is practically, ordinarily and commercially usable when used alone or when blended for the generation of power in internal combustion engines, and in propelling motor vehicles, and that when so used alone or blended said solvent will operate an internal combustion engine or propel a motor vehicle with power and efficiency and without mechanical injury thereto. Defendant admits that said solvent is a petroleum products, has a gravity test above 46 degrees tagliaubes baume scale at a temperature of 60 degrees Fahrenheit, and admits that said solvent could be mixed or blended with other petroleum products so as to make it usable in motor vehicles. Defendant denies that to make said sol-

vent usable it would be necessary to blend said solvent with a boiling product having a boiling range beginning at 80 degrees Fahrenheit and vanishing at 230 degrees Fahrenheit, and a petroleum range beginning at 290 degrees Fahrenheit and vanishing at 420 degrees Fahrenheit. Defendant denies that to mix or blend said solvent would cost more than twice the cost of gasoline on the open market. Defendant admits that said solvent will start an internal combustion engine or motor in a motor vehicle when said engine or motor has been previously heated but denies that said solvent will not start a cold engine or motor. Defendant admits that said solvent when used alone will run an internal combustion engine or propel [fol. 37] a motor vehicle, but denies that the acceleration would be poor and the mileage power so low that the use of said solvent for said purpose would be impracticable. Defendant avers that the cost of said solvent is approximately 6 and 6/10 cents per gallon at the refinery and that the cost of the gasoline most commonly used in propelling motor vehicles is 6 cents per gallon at the refinery. Defendant further alleges that said solvent can be mixed or blended in equal proportion with kerosene costing four cents per gallon at the refinery, casinghead gasoline costing four cents per gallon at the refinery, and that the resulting product which has thus cost four and six-tenths cents per gallon is, in starting and propelling a motor vehicle or running an internal combustion engine, the equivalent in power, mileage and efficiency of gasoline selling at the refinery for six cents per gallon. Thus it is practical and commercially desirable to blend said solvent with kerosene and casinghead gasoline as here set out and the resulting product is ordinarily, practically and commercially usable either in operating an internal combustion engine for the generation of power or in propelling a motor vehicle. Defendant further alleges that said solvent can be mixed with casinghead gasoline in the proportion of one gallon of solvent to two gallons of casinghead gasoline and that the resulting product which has thus cost only four and six-tenths cents per gallon is, in starting and propelling a motor vehicle or in running an internal combustion engine for the generation of power, the equivalent in power, mileage and efficiency with gasoline selling at the refinery for six cents per gallon, and

it is thus practical and commercially desirable to blend said solvent with casinghead gasoline and the resulting product is ordinarily, practically and commercially usable in internal combustion engines for the generation of power or in propelling a motor vehicle.

[fol. 38] Defendant denies that complainant is not a distributor as defined by Section 5, paragraph (e) of said Chapter 162, but alleges and avers that complainant is a distributor within said meaning for the reason that complainant has imported, received, purchased, acquired, stored and used said solvent which is gasoline under said Chapter 162 without paying any tax on said solvent, and the tax on which solvent is not covered by the bond of a qualified Mississippi distributor. Defendant avers that by virtue of being a distributor complainant is liable to defendant for 6c per gallon for each gallon of solvent received and stored or used by complainant in Mississippi.

Defendant denies that complainant cannot apply for a permit as a distributor under said Chapter 162, and denies that said permit could not be issued to complainant.

Defendant denies that complainant could not establish a basis for refund on the solvent by complying with Section 15 of said Chapter 162, but alleges that this fact is not involved in this action.

Defendant denies the conclusions of law alleged by complainant in its bill of complaint and alleges that said conclusions of law are not properly contained in said bill and that it is unnecessary to deny the same.

Defendant denies that complainant does not owe 6c per gallon excise tax on the carload of solvent containing 7906 gallons, mentioned in complainant's bill of complaint, but alleges that said tax, plus a penalty of twenty-five per cent thereon, is due to the defendant by complainant. Defendant admits that he has made demand on complainant for the payment of said tax and will collect the same unless he is restrained from so doing, but denies that the collection of this tax will cause irreparable injury to complainant.

[fol. 39] Defendant denies that a construction of said Chapter 162 so as to impose a tax on complainant in the instant case would violate either the Constitution of the State of Mississippi or the Constitution of the United States.

Defendant denies that complainant is entitled to either a temporary or a final and permanent injunction as prayed for in complainant's bill of complaint.

Defendant prays that this Honorable Court refuse the relief prayed for by complainant, or any other relief for complainant.

And so having made such answer as he deemed and considered meet and proper, defendant respectfully prays that he be allowed to go without cost.

Howard Dyer, Commissioner, Defendant, By Greek L. Rice, Attorney General, By Wm. H. Maynard, Assistant Attorney General, Attorneys for Defendant.

State of Mississippi,
County of Hinds.

This day personally appeared before me, the undersigned authority in and for the above County and State, Joe Jeith, Assistant Motor Vehicle Commissioner of the State of Mississippi, who, after being duly sworn by me states that he has read the foregoing answer and that the matters and facts are true and correct as therein stated.

—— —— Assistant Motor Vehicle Commissioner.

[fol. 40] Sworn to and subscribed before me, this the 15th day of May, 1937.

—— —— Supreme Court Clerk.

PETITIONER'S EXHIBIT 4

U. S. Board of Tax Appeals, Div. 3, Docket 103015

Admitted in Evidence Jan. 29, 1941

No. —

In the Chancery Court of Hinds County, Mississippi

DIXIE PINE PRODUCTS COMPANY, a Corporation, Complainant,

vs.

HOWARD DYER, Commissioner, Defendant

AGREED STATEMENT OF FACTS

It is hereby stipulated and agreed by and between T. J. Willis, attorney for the complaint, and E. R. Holmes, Jr., Assistant Attorney General for the State of Mississippi, for

and on behalf of the defendant, that the following statement of facts are the facts in this case and are to control in the decision of the case, submitted upon a bill of complaint, answer and proof.

That the complainant is engaged in the naval stores business, with its place of business in the City of Hattiesburg. That in the conduct of its business in the naval stores operations that it extracts turpentine, pine oil and resin from the dead wood of the stumps, tops and waste wood left of the pine forests after the timber has been cut and lumbered therefrom.

[fol. 41] That in the operation of the naval stores business the resin is extracted from the pine wood by being dissolved in a substance specially prepared for that purpose. That in order to commercially extract the resin from the wood it is necessary to use a substance that will dissolve the resin and after the resin has been dissolved from the wood to be easily separated from the solvent by distillation.

That in the operation of the business the complainant has made for it and it uses a solvent made from petroleum products. That the initial boiling point of the said product is 230 degrees Fahrenheit or thereabout. That the vanishing point or the point at which the entire solvent passes into a vapor is 290 degrees or thereabout. That the solvent so used thus has a boiling range of approximately 60 degrees Fahrenheit.

That the complainant purchases the greater portion, if not all of its solvent from the American Mineral Spirits Company of Chicago, Illinois. That it buys the said solvent in tank car lots, outside of the State of Mississippi and that the said tank cars are shipped in over the railroads of the state and move in interstate commerce to complainant's plant. That the said solvent is pumped from the tank cars, which hold from 8000 to 10000 gallons each, into the reservoir of the plant, in which the pine wood is placed and the resin dissolved therefrom. That the complainant has no storage tank and does not store the said solvent otherwise than to pump it from the tank cars, when received in shipment, into the reservoir where it is mixed with other solvents, that are [illegible] being used, and is so pumped into the reservoir to replenish the solvent that is lost by evaporation and waste in the operations. That the said reservoir holds approximately 60,000 gallons of the solvent and that when by waste, evaporation, etc. the amount is reduced

by approximately 8 to 10 thousand gallons, a new tank car [fol. 42] of the solvent is received, by previous arrangement, and is pumped from the tank car into the reservoir, thus adding about 1/6 volume of the newly received solvent to the 5/6 remaining in the reservoir.

That in the operation the solvent is used over and over and over, the resin being separated by the process of distillate, having a boiling point different from that of the solvent in which the resin is dissolved. That in the distillate process it is impossible to completely separate the solvent and the resin so that at all times the solvent has a large percentage of resin suspended in dissolution that does not readily separate by distillation, so that the said solvent is heavily charged with the resin, which is a carbon compound.

It is further agreed that gasoline, as defined by Chapter 163, Laws of 1936, is free from water and suspended matter and that 10% shall be recovered when the thermometer does not read in excess of 176 degrees Fahrenheit, nor less than 122 degrees Fahrenheit. That 50% shall be recovered when the thermometer reads 284 degrees Fahrenheit. That 90% shall be recovered when the thermometer reads 392 degrees Fahrenheit and that the end point shall not be higher than 437 degrees Fahrenheit. It is agreed that gasoline has an initial boiling point of approximately 100 degrees Fahrenheit and a varishing point of approximately 432 degrees Fahrenheit.

It is further agreed that in starting a motor driven vehicle that the low vaporization point of the fuel is necessary in order to start the unheated motor. That where motor fuel does not have an initial vaporizing point of less than 230 degrees Fahrenheit, it is more difficult to start an unheated motor. That the solvent here in question has an initial vaporizing point of 230 degrees Fahrenheit.
[fol. 43]. It is further agreed that the heated motor gains its power of mobility from the motor fuel with a high volatile temperature so that the greater mobilization of the motor vehicle is gained from that portion of the fuel which has a boiling range of from 300 degrees to 400 degrees fahrenheit.

It is agreed that the solvent will propel a gasoline motor when the motor is heated and that it will run the said motor, after the motor has been heated, but because of its low boiling range or vanishing point that it does not give

to the motor the pulling power that gasoline, as defined by Chapter 163, Acts of the Legislature of 1936, gives. That when transferred from the tank cars into the solvent tanks of the complainant company and there mixed with the solvent saturated with resin, that because of the carbonous composition of the resin the said solvent is thereby made unusable even in mixtures and blends for a motor vehicle fuel.

It is agreed that by tests the said solvent, when placed in an automobile where the motor has already been heated that it will run an automobile along the paved highway and will attain a mileage almost as great per gallon as gasoline.

It is further agreed that the solvent has a specific gravity of 56 T. B. scale at a temperature of 60 degrees fahrenheit and is manufactured from and is a petroleum product.

It is further agreed that the complainant does not use the said solvent in driving stationary engines or propelling motor vehicles of any kind or character over the highways of the State of Mississippi, or over its private property. That to this complainant the use of said solvent is impractical and unavailable because it is immediately mixed in its solvent tanks, which contain resin.

It is agreed that in the manufacture of the solvent that that part of petroleum distillates that volatilizes between [fol. 44] a temperature of between 230 degrees fahrenheit and 290 degrees fahrenheit is used and that the manufacture of said solvent is much more expensive than the manufacture of gasoline so that it sells for considerably more by the manufacturer than gasoline can be purchased from the refineries.

It is agreed that solvent can be mixed with gasoline in varying proportions and can be used in propelling motor vehicles or in internal combustion engines, either when so mixed or alone. It will start an unheated motor in average or ordinary weather conditions, either alone or mixed with gasoline, but, solvent, either alone or when mixed with gasoline will not propel a motor vehicle or start a motor as rapidly or as easily as gasoline. Solvent will start, run and accelerate a motor vehicle, but not as rapidly or as easily as gasoline, or when mixed with gasoline, but the higher the proportion or percent of gasoline in the mixture, the easier the starting of the motor and the more miles per gallon will be obtained.

It is further agreed that no substitute has been found or is available for use as a solvent to separate the resin in the pine stumps, and other waste material, of the yellow pine area of the state, for this solvent and that the only other methods used by other concerns are patented processes, which are not available to any naval stores plant other than the patentee. That a denial of the use of this solvent in the manufacture of naval stores products or a discriminatory tax thereon, prohibitive in its effect might effectuate a monopoly in the manufacture of wood resin in the hands of the patentee of the patented process of removing resin from the waste wood and on which patented substance and process no tax has been levied.

This the 6th day of December, 1938.

T. J. Wills, Attorneys for Complainant. Greed L. Rice, Atty. Genl., E. R. Holmes, Jr., Asst.

[fol. 45] PETITIONER'S EXHIBIT 5

U. S. Board of Tax Appeals, Div. 3, Docket 103015

Admitted in Evidence Jan. 29, 1941

DIXIE PINE PRODUCTS Co., Plaintiff,

vs.

HOWARD DYER, Motor Vehicle Commissioner, Defendant

FINAL DECREE

This day this cause came on to be heard on Bill of Complaint and the answer of the defendant and the agreed statement of facts, stipulated by the parties hereto, and it appearing to the Court, that the defendant, as motor vehicle commissioner has assessed the complainant with the gasoline tax imposed by Chapter 162 Laws of 1936 on the solvent used by the complainant in extracting rosin from the pine stumps and other wood in its, naval stores plant at Hattiesburg, Mississippi, by distress as provided by said act of the Legislature, and that he will so collect the said tax unless restrained from so doing; and it further appearing to the Court that the decision of the said Motor Vehicle Commissioner in assessing said tax on said solvent

is erroneous and unwarranted under the said law and should be reversed; and that he, the said defendant should be enjoined from assessing said tax and collecting or attempting to collect the same.

It is therefore ordered that the decision of the defendant to make the assessment of the said gasoline tax under Chapter 162 laws of 1936 on the said solvent be and the same is hereby reversed and canceled and held for naught; and that the defendant, Howard Dyer; Motor Vehicle Commissioner be and he is hereby forever enjoined from assessing said tax against the complainant on the solvent [fol. 46] so used by it in its retorts for extracting the rosin from pine stump and wood and enjoined from collecting or attempting to collect said tax on said solvent.

It is further ordered that the defendant pay all costs of suit.

Done, ordered and decreed in open Court this the 21 day of December, A. D. 1938.

V. J. Stricker, Chancellor.

Copy: Filed: 12/21/38:

W. W. Downing, Clerk.

Attest: A true copy:

W. W. Downing, Clerk.

12/21/38:

J. F. Vaughn, D. Cl.

[fol. 47] BEFORE UNITED STATES BOARD OF TAX APPEALS

Docket No. 103015

DIXIE PINE PRODUCTS COMPANY, Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent

Promulgated October 7, 1941

Deduction—Taxes—Accrued and Later Held Not Due.—The petitioner, which refused to pay a state gasoline tax on solvent used by it, but made a closing accrual upon advice of counsel, was not entitled to deduct the amount of the accrual as taxes for 1937 where the Court later decided that the tax never applied to the solvent.

T. J. Wills, Esq., R. G. Wooton, C. P. A., and H. B. Kelleher, Esq., for the petitioner.

Donald P. Moyers, Esq., for the respondent.

The Commissioner has determined deficiencies in income and excess profits taxes of $3,600.09 and $1,169.95 for the calendar year 1937. The issue is whether the petitioner may deduct in 1937 state gasoline tax which it accrued in that year but never paid, contending successfully that the law did not apply.

Findings of Fact

The petitioner, a corporation, filed its tax return for the period in question with the collector for the district of Mississippi.

The petitioner was engaged in the business of extracting turpentine, pine oil, and resin from stumps and other waste wood. A quantity of solvent made from petroleum products was used by the petitioner in this process. The Assistant Motor Vehicle Commissioner of Mississippi, contending that this solvent was usable in the operation of motor vehicles, assessed a state gasoline tax in 1936 on the solvent received and used by the petitioner in that year. This tax was levied under sections 5(a) and 8(a) of chapter 162, Laws of Mississippi, 1936, wherein "gasoline" is defined as follows:

[fol. 48]

> * * * The word "gasoline" as used in this act shall include all liquid fuels which are used or usable in propelling motor vehicles, either when used alone or when mixed, blended, or compounded, including liquids ordinarily, practically and commercially usable in internal combustion engines for the generation of power, and all distillates of, and condensates from petroleum, natural gas, coal, coal tar, vegetable ferments, and other products so usable and received in this state, having a gravity test above 46° taglianbes baume scale, at a temperature of 60° F.

The petitioner paid the tax assessed for 1936. Other companies engaged in similar business also paid taxes assessed on them for the use of the solvent.

A bill of complaint against the Motor Vehicle Commissioner of Mississippi was filed by the petitioner on August 6, 1936, in the Chancery Court for Forest County, Mississippi, in which it alleged that the nature of the solvent and the use to which it was put did not fall within the taxing

statute and asked for temporary and permanent injunctions against the future collection of the tax. It alleged, further, that the tax was on interstate commerce and that the exaction of it would be in violation of the Constitutions of the United States and the State of Mississippi. The Motor Vehicle Commissioner demurred to the bill of complaint and, on August 15, 1936, the demurrer to the bill was sustained by the Court.

[fol. 49] An appeal from the decree sustaining the demurrer was taken by the petitioner to the Supreme Court of Mississippi. That Court on January 25, 1937, reversed the action of the Chancery Court in sustaining the demurrer and remanded the case to the lower Court. *Dixie Pine Products Co. v. Dyer*, 177 Miss. 873; 172 So. 145. The Court stated in its opinion:

> The bill of complaint herein clearly alleges that the solvent or reducing agent used by appellant is not used in propelling motor vehicles, and is not ordinarily, practically, and commercially usable in internal combustion engines or in propelling motor vehicles, and states the facts upon which these allegations are based, and consequently upon the pleading here we think it must be held that this solvent does not come within the definition of gasoline upon which a tax is imposed by section 8 (a) of the act. The demurrer interposed to the bill of complaint should, therefore, have been overruled, and the decree of the Court below will be reversed and the cause remanded.

The petitioner, after the date of this decision, denied that it owed and ceased to pay gasoline tax on the solvent used by it. The Motor Vehicle Commissioner continued to assess and demand payment of the tax throughout 1937. The Motor Vehicle Commissioner advised the taxpayer then that he was uncertain whether the tax was due for the use of the solvent and that the determination of liability was then dependent upon the final decision of the Court. Other concerns using solvent in a similar process, with one exception, paid gasoline taxes assessed in 1937 for its use.

The Motor Vehicle Commissioner, after the decision of the Supreme Court of Mississippi in January 1937, prepared evidence and argument to support its position that

the tax was due. He secured from the petitioner a sample [fol. 50] of its solvent and tested its ability to run an automobile engine. He filed an answer to the bill of complaint on May 15, 1937, in which he denied that the petitioner was not liable for the tax and that it was entitled to an injunction. The Motor Vehicle Commissioner was represented in this action by the Attorney General of Mississippi and his assistant.

The petitioner and the Attorney General of Mississippi, on December 6, 1938, filed an agreed statement of facts in the action brought by the petitioner and, on December 21, 1938, the Chancery Court of the First Judicial District of Hinds County, Mississippi, rendered its final decree perpetually enjoining the Motor Vehicle Commissioner from assessing gasoline tax under chapter 162 of the 1936 Laws on the solvent used by the petitioner. This result was affirmed by the Supreme Court of Mississippi on October 23, 1939. *Dyer v. Dixie Pine Products Co.*, 186 Miss. 567; 191 So. 429. The Mississippi State Legislature, in its regular 1938 session, by enactment exempted the solvent used by the petitioner from gasoline tax from and after June 1, 1938.

The petitioner keeps its books and files its income tax returns on an accrual basis. Entries accruing the gasoline tax assessed on it by the Motor Vehicle Commissioner were directed to be made by the petitioner's attorneys by letter dated in December 1937. The entries were made at some time between January 1 and March 15, 1938, as of December 31, 1937, in the course of closing and auditing the 1937 books. The amount of the tax thus accrued for 1937 was $20,839.38. This amount was deducted by the petitioner on its income tax return for 1937. The petitioner never paid the taxes. The Commissioner disallowed the deduction.

The amount of $20,839.38 was included in the petitioner's 1938 income on its tax return, in view of the decree of December 1938, as recovery.

[fol. 51]

OPINION

MURDOCK:

This case is similar in some respects to *J. M. Dougherty's Sons, Inc.*, 42 B. T. A. 892, and *Estate of David Davies*, 42 B. T. A. 965. The *Dougherty's Sons, Inc.*, case has recently been reversed, 121 Fed. (2d) 700. However, the present

case has points of difference from the *Dougherty's* case and is like some other cases of the Board which have been affirmed by other Circuit Courts. It is not a case of an unconstitutional tax, but one of mistake in thinking that a taxing act applied to this petitioner. *Inland Products Co.*, 10 B. T. A. 235; affd., 31 Fed. (2d) 867. Cf. *Mary W. Leach*, 16 B. T. A. 781; affd., 50 Fed. (2d) 371. The tax was never due and the efforts to collect it were all a mistake, as the Court finally decided the law did not apply. The collector admitted his doubt after the decision on the demurrer. The petitioner, believing that no tax was due, ceased and refused to pay, and only made a closing accrual upon advice of counsel. The Commissioner determined that the 1937 taxes were not deductible from income as a properly accrued expense of that year. We hold, upon authority of the cases cited above, that he did not err.

Reviewed by the Board.

Decision will be entered for the respondent.

SMITH dissents.

(Seal)

[fol. 52] BEFORE UNITED STATES BOARD OF TAX APPEALS.
Washington

Docket No. 103015

DIXIE PINE PRODUCTS COMPANY, Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent

DECISION

Pursuant to the determination of the Board as set forth in its findings of fact and opinion promulgated October 7, 1941, it is

Ordered and Decided: That there are deficiencies in income and excess-profits taxes for the calendar year 1937 in the respective amounts of $3,600.09 and $1,169.95.

(Signed) J. E. Murdock, Member. (Seal.)

Enter: Entered Oct. 11, 1941.

IN UNITED STATES CIRCUIT COURT OF APPEALS

PETITION FOR REVIEW

Received December 22, 1941

Filed January 9, 1942

(Title Omitted)

To the Honorable Judges of the United States Circuit Court of Appeals for the Fifth Circuit:

Now comes the Dixie Pine Products Company, a corporation, by T. J. Wills, its attorney, and respectfully shows:

I

The petitioner herein referred to as the tax payer, is a resident of the City of Hattiesburg, County of Forrest, [fol. 53] and State of Mississippi and its post office address is Hattiesburg, Mississippi.

Respondent is the duly appointed, qualified and acting Commissioner of Internal Revenue of the United States and herein referred to as the Commissioner.

The tax payer filed an income tax return for the taxable year of 1937 with the Collector of Internal Revenue for the District of Mississippi, whose office is located within the Fifth Judicial Circuit wherein the tax payer also resides.

II

The Commissioner determined a deficiency in income and excess profit taxes against the tax payer for the year 1937 in the amount of $4770.04, and thereafter, in accordance with the provisions of the applicable statute, sent to the tax payer, by registered mail, a notice of said deficiency.

Thereafter, within the time provided by law, this petitioner filed a petition for review from the said notice of deficiency with the United States Board of Tax Appeals. The case was, in due course, submitted to the Board upon evidence, exhibits and stipulations of fact for its finding and decision. On the 7th day of October, 1941, the Board promulgated its finding of fact and opinion in said proceedings and entered a judgment and final

order therein whereby it ordered and decided that there was a deficiency of $3600.09 in the tax payer's income taxes for the year 1937 and deficiency of $1169.95 in its excess profit taxes for the said year.

III

The deficiencies in the tax payer's income taxes and its excess profit taxes, which were in controversy before the [fol. 54] Board of Tax Appeals, arose and resulted from the determination of the Commissioner that the sum of $20,840.12, which the tax payer accrued for gasoline taxes, assessed by the State of Mississippi, upon solvent used in its manufacturing plant, was not deductible from its gross income as a proper accrual of a tax levied by the State of Mississippi deductible from the said gross income in determining its net income subject to taxation.

Chapter 162 Laws of 1936, State of Mississippi, impose an excise tax on gasoline and oils usable in propelling motor vehicles. The tax payer was engaged in the naval stores business. There were four other companies in the State of Mississippi so engaged in the naval stores business. All five of the companies, so engaged in naval stores business, used a petroleum product which has been referred to as a cut of gasoline, as the solvent in which to dissolve the rosin from the cut up chips. The five naval stores companies, acting in concert, had not paid a gasoline tax on this solvent.

The 1936 session of the Legislature appointed a roving committee to look into the collections and payment of gasoline tax. A tax similar to the 1936 tax had been imposed by the Legislature in 1932. This roving committee back assessed the five naval stores companies, operating in the State, with this gas tax for the four previous years under the 1932 act. Finally they compromised with the five naval stores companies on ¼ of one per cent per gallon, the tax being 6¢ per gallon with a 25% penalty. This settlement so affected was for the period ending May 1st, 1936. The Legislature in 1936 created a Motor Vehicle Commissioner and re-enacted the gasoline tax acts. The Motor Vehicle Commissioner levied the tax re-enacted in Chapter 162 of the Laws of 1936 and demanded payment thereof.

[fol. 55] This tax payer, along with the other naval stores companies, paid the tax for 1936. However, this tax payer

filed a suit to enjoin the collection of the tax. On the filing of this suit, and while it was pending for the year 1937, this tax payer refused to pay to the State of Mississippi the tax so assessed. The other four naval stores companies continued to pay the tax. The reason this tax payer refused to pay the tax was because there was no provision in the law for a refund of the tax, should it be successful in enjoining the collection of the tax, the tax previously paid having gone into the State Treasury. The other tax payers continued to pay the tax during 1937.

This tax payer was on an accrual basis and the amount necessary to pay the tax assessed and demanded by the State, should the litigation be finally terminated against this tax payer, was the amount of $20,840.12. This amount was accrued by the tax payer since it was on the accrual basis as taxes demanded, the collection of which was sought to be enjoined.

The other tax payers continued to pay the tax and when in 1938 this tax payer was successful in enjoining the collection of the tax, it transferred from its accrued tax account, the said amount so accrued, to its recaptured account. The other tax payers, similarly situated with this tax payer, had paid their tax into the State Treasury and had taken credit on their income tax and in all things had acted as this tax payer had with the exception that in accruing their tax they paid it into the State Treasury while this tax payer accrued his tax but refused to pay it in. The Legislature, by chapter 98, Laws of 1940, appropriated funds and authorized the Motor Vehicle Commissioner to refund the tax that had been paid in by the other four naval stores companies, under the statute, and they then in turn received a refund of the tax they had paid and placed it in their returns in the same manner [fol. 56] that this tax payer handled the accrued tax in controversy in this deficiency tax assessment.

In the findings, opinion and final decision of the Board, above mentioned, the Commissioner's contention is upheld and the tax payer is denied the deduction of said sum from its gross income for 1937 although the said deductions, when the final adjudication was had, were placed in the income for 1938 as recaptured tax accrual and returns made thereon in the 1938 return. The tax payer says that in this the Board of Tax Appeals committed error.

IV

The petitioner says that in the record and proceedings before the Board of Tax Appeals, and in the decision and final order entered by the Board, manifest error occurred and intervened to the prejudice of the petitioner and it assigns and avers that the following errors, and each of them occurred in the said record proceedings and decision and final order and that upon these it relies to reverse the said decision and final order so rendered and entered by the Board of Tax Appeals.

Assignments of Error

(1) The Board of Tax Appeals erred in holding that the sum of $20,840.12, accrued by petitioner as the tax levied and demanded by the taxing authorities of the State of Mississippi, under Chapter 162 Laws of 1936, was not deductible from petitioner's gross income as a proper tax accrual demanded by the taxing authorities of the State of Mississippi, and especially provided for by section 23 Revenue Acts of 1936, which provides:

"In computing net incomes there shall be allowed as deductions:

[fol. 57] (c) Taxes Generally—Taxes paid or accrued within the taxable year * * * * *"

(2) The Board of Tax Appeals erred in determining that there was a deficiency in petitioner's income tax for the year 1937 in the sum of $3600.09.

(3) The Board of Tax Appeals erred in determining that there was a deficiency in petitioner's excess profit tax for the year 1937 in the sum of $1169.95.

Wherefore the petitioner petitions that the decision of the Board of Tax Appeals be reviews by the United States Circuit Court of Appeals for the Fifth Circuit; that a transcript be prepared in accordance with law and with the rules of said Court and transmitted to the Clerk of said Court for filing and that appropriate action be taken by said Court to the end that the errors complained of may be reviewed and corrected.

T. J. Wills, Attorney for Petitioner.

Duly sworn to by T. J. Wills. Jurat omitted in printing.

[fol. 58] BEFORE UNITED STATES BOARD OF TAX APPEALS

AFFIDAVIT OF SERVICE—Filed January 9, 1942

STATE OF MISSISSIPPI,
Forrest County.

Personally appeared before me the undersigned Notary Public, T. J. Wills, attorney of record for the petitioner, who being first duly sworn, says on oath that he has mailed a copy of the foregoing petition for a review of the decision of the Board of Tax Appeals and a copy of the praecipe filed in the cause of Dixie Pine Products Company vs. Commissioner of Internal Revenue, Docket No. 103015, to J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, Washington, D. C., postage prepaid, on this the 18th day of December, A. D. 1941.

T. J. Wills.

Subscribed and sworn to before me on this the 18th day of December, A. D. 1941. Edna B. Komp, Notary Public. (Seal.) My commission expires Oct. 18, 1942.

BEFORE UNITED STATES BOARD OF TAX APPEALS

PRAECIPE FOR RECORD—Filed January 9, 1942

[Title omitted]

To the Clerk of the United States Board of Tax Appeals:

You will please prepare, transmit and deliver to the Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, copies duly certified, as corrected, of the following documents and records in the above-entitled cause in connection with and accompanying the enclosed petition for review by the said Circuit Court of Appeals for the Fifth Circuit, heretofore filed in said cause and [fol. 59] considered by the Board of Tax Appeals on the order of the Commissioner of Internal Revenue making an assessment of deficiency income tax and an excess profit tax:

1. The docket entries of the proceedings before the Board.

2. All pleadings filed and considered by the Board.

(a) Petition including annexed copy of deficiency letter in this cause.

(b) Answer of the Commissioner in this cause.

(c) All the evidence, exhibits and documents introduced as evidence in said cause and heard and considered by the Board of Tax Appeals.

3. Finding of fact, opinion and decision of the Board.

4. Petition for review, assignment of error, together with proof of service of notice of filing petition for review and of service of a copy of petition for review.

5. This praecipe.

T. J. Wills, Attorney for Petitioner.

[fol. 60] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 61] That thereafter the following proceedings were had in said cause in the United States Circuit Court of Appeals for the Fifth Circuit, viz:

ARGUMENT AND SUBMISSION

Extract from the Minutes of February 17, 1943

No. 10270

DIXIE PINE PRODUCTS COMPANY

versus

COMMISSIONER OF INTERNAL REVENUE

On this day this cause was called, and, after argument by T. J. Wills, Esq., for petitioner, and Miss Maryhelen Wigle, Special Assistant to the Attorney General, for respondent, was submitted to the Court.

[fol. 62] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 10270

DIXIE PINE PRODUCTS COMPANY, Petitioner,

versus

COMMISSIONER OF INTERNAL REVENUE, Respondent

Petition for Review of Decision of the United States Board of Tax Appeals (District of Mississippi)

March 5, 1943

Before Hutcheson, Holmes and McCord, Circuit Judges

McCORD, Circuit Judge:

The Petition for Review involves deficiencies in income and excess profits taxes of $3,600.09 and $1,169.95 determined against Dixie Pine Products Company for the calendar year 1937. The issue is whether the taxpayer's 1937 tax return may be corrected by disallowing deduction of

[fol. 63] an accrued item for Mississippi gasoline taxes which the taxpayer contested and refused to pay, and which, as the result of successful litigation in the State Courts, it never had to pay.

Dixie Pine Products Company was engaged in Mississippi in the business of extracting turpentine, pine oil, and resin from stumps and other waste wood. A quantity of solvent made from petroleum products was used in the process. In 1936 the taxing authorities of Mississippi, contending that the solvent was usable in the operation of automobiles, assessed a State gasoline tax on the solvent received and used by Dixie in that year. The tax was levied under Sections 5(a) and 8(a) of Chapter 162, Laws of Mississippi, 1936, wherein gasoline is defined.

The taxpayer paid the gasoline tax assessed in 1936, and in the same year filed suit in the State Court against the Motor Vehicle Commissioner of Mississippi, alleging that the nature of the solvent and the use to which it was put did not fall within the ambit of the taxing statute; and asking for temporary and permanent injunctions against future collections of the tax. A demurrer filed by the Motor Vehicle Commissioner was sustained by the lower court. An appeal was taken and on January 25, 1937, the Supreme Court of Mississippi handed down its decision holding that on the pleadings the solvent did not fall "within the definition of gasoline upon which a tax is imposed by Section 8(a) of the act". *Dixie Pine Products Company v. Dyer*, 177 Miss. 873, 172 So. 145. After this decision came down, the taxpayer at all times denied that it owed, and ceased and refused to pay, gasoline tax on the solvent used by it.

On December 8, 1938, the taxpayer and the Attorney General of Mississippi filed an agreed statement of facts in the State Court action, and on December 21, 1938, the Chancery Court of the First Judicial District of Hinds County, Mississippi, entered its final decree perpetually enjoining the Motor Vehicle Commissioner from assessing [fol. 64] gasoline tax on the solvent used by Dixie. The final decree was affirmed by the Supreme Court of Mississippi, *Dyer v. Dixie Pine Products Company*, 186 Miss. 567, 191 So. 429.

Dixie Pine Products Company kept its books and filed its income tax return on the accrual basis for the year in question. By letter dated in December, 1937, the attor-

ney for the taxpayer directed that book entries be made accruing the gasoline tax assessed by the Motor Vehicle Commissioner in 1937. In the course of auditing and closing the 1937 books, the actual accrual entries were made by an auditor sometime between January 1, and March 15, 1938, as of December 31, 1937. The amount of tax thus accrued on the books for 1937 was $20,839.38, and this amount was deducted from income in making the 1937 income tax return. The taxpayer never paid the State gasoline taxes, and by way of compensating entry the amount of $20,839.38 was included in income in Dixie's 1938 income tax return as a recovery in view of the Mississippi Chancery Court's decree of December, 1938.

The petitioner contends that its 1937 accrual and deduction of the tax item of $20,839.38 was proper, and that the Board of Tax Appeals erred in holding that this amount was not deductible from gross income for that year. The decision of the Board is without error. During the whole of the tax year for which the right of deduction is asserted, Dixie Pine Products Company was denying liability for the State gasoline taxes, and was affirmatively litigating the applicability of the taxing statute to the solvent used by it. Indeed, when it stopped paying the taxes assessed against it by the Motor Vehicle Commissioner, it had won the first round of litigation in the Supreme Court of Mississippi.

Returns of taxpayers, whether upon the cash or accrual basis, must clearly reflect the income of the tax year; and the great weight of authority is to the effect that where, [fol. 65] as here, a taxpayer is on the accrual basis, it may not deduct as an expense an item on which it is denying or contesting liability. "A mere contingent claim, especially a contested one, whether of loss or gain, may never be sustained or realized; it is too uncertain to be considered in making up an income tax return". *Commissioner v. Southeastern Express Co.*, 56 F. 2d 600; *Lucas v. American Code Co.*, 280 U. S. 445; *Brown v. Helvering*, 291 U. S. 193; *Pharr & Sons v. Commissioner*, 56 F. 2d 832. Cf. *J. A. Dougherty's Sons v. Commissioner*, 121 F. 2d 700; *Ben Bimberg & Co. v. Helvering*, 126 F. 2d 412.

The compensating entry made in 1938 by the petitioner does not preclude correction of the erroneous return for 1937. The correction, coming well within the limitation

period, may be made so that the true income may be reflected for 1937. The taxpayer will, of course, have a claim for refund of any tax overpayment resulting from inclusion of the compensating entry in income of 1938. *Ben Bimberg & Co. v. Helvering*, 126 F. 2d 412; *Leach v. Commissioner*, 50 F. 2d 371; *Bergan v. Commissioner*, 80 F. 2d 89; *Inland Products Co. v. Blair*, 31 F. 2d 867.

The decision of the Board is Affirmed.

[fol. 66] JUDGMENT

Extract from the Minutes of March 5th, 1943

No. 10270

DIXIE PINE PRODUCTS COMPANY,

versus

COMMISSIONER OF INTERNAL REVENUE

This cause came on to be heard on the petition of Dixie Pine Products Company for a review of a decision of the United States Board of Tax Appeals, and was argued by counsel;

On consideration whereof, It is now here ordered, adjudged and decreed by this Court, that the decision of the said United States Board of Tax Appeals in this cause be, and the same is hereby, affirmed.

[fol. 67] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 68] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 11, 1943

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on Cover: Enter T. J. Wills, File No. 47,572. U. S. Circuit Court of Appeals, Fifth Circuit, Term No. 84. Dixie Pine Products Company, Petitioner, vs. Commissioner of Internal Revenue. Petition for a writ of certiorari and exhibit thereto. Filed June 5, 1943. Term No. 84 O. T. 1943.